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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

AMBROSE OLDLAND, CARRIE KNOWLES, ERNEST OLDLAND, GERALD OLDLAND, WALTER OLDLAND, CECILIA H. YOUNG, as sole Heir at Law of Leonard J. Young and as sole Legatee and Devisee under the last will and testament of said Leonard J. Young, deceased, THOMAS A. YOUNG, MABEL McGLINN DAIGNAULT, MARGARET McGLINN, ESTELLE CONNER WAIT, HENRY W. CONNER, RUTH CONNER WILLS, LEONARD McGLINN, IRVING A. WYNN, CARLYLE WYNN, JR., CARLYLE WYNN, SR., MARION P. McGLINN, a minor appearing by her next friend, Ernest Oldland, WILLIS SAXE MONTGOMERY III, MARCELLE MONTGOMERY ELLIS, E. C. PARSONS, M. K. ANDREW, WILLIAM K. PARSONS, ELIZABETH G. CARNEY, THOMAS F. CARNEY, MARIE LOUISE CROCKETT, WILLIAM CHARLES CARNEY, BETTY CARNEY, also known as Elizabeth Carney, and ERNESTINE CARNEY, minors, appearing by their next friend, Elizabeth G. Carney, HARRIETT ROSE KIMBALL, JOHN WATSON CARD, as Executor and Devisee under the last will and testament of Maggie Moog, Deceased, BENNETT C. SHIDELER, ELIZABETH R. WELTON, CORDELIA C. MILLER, OLIVE O. JOHNSTON, LILLIAN STEVENSON, CHARLES W. BANTA, ANNA REES, AVIS NEAL ROEMER, JOE TRACHTA, JOE JUHAN, CHARLES J. PEARSALL, HATTIE P. JOCELYN, CLIFFORD R. PEARSALL, RICHARD PEARSALL, ALICE P. HEINDEL, MARY PEARSALL, RAYMOND PEARSALL, CLAIRE P. PLATTER, FRANCIS M. SHIDELER, BYRON H. SHIDELER, JOHN CHESTER SMITH, an infant, by his next friend, Joseph J. Shideler, ELEANOR HASKINS, ROBERT W. SHIDELER, WALTER W. SHIDELER, EDWARD T. WILLIAMS, THOMAS EDWARD WILLIAMS, an infant, by his next friend, Joseph J. Shideler, and JOSEPH J. SHIDELER,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY,

Respondent.

FRANK DELANEY,
L. H. LARWILL,
Counsel for Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Tenth Circuit, entered in the above entitled case on March 10th, 1951.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals on second appeal, entered March 10th, 1951, is not yet reported. It is printed in the record (R. 33-39). The case was before said Court of Appeals on a prior appeal and is reported in 179 Fed. (2d) 408.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10th, 1951 (R. 40-41). A petition for rehearing filed on March 29th, 1951, (R. 48) was denied on April 5th, 1951, (R. 49). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1).

III.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the decision of the United States Court of Appeals for the Tenth Circuit, on the second appeal, violates the doctrine of the law of the case, and in so doing conflicts with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Chicago, St. Paul, M. & O. R. Company vs. Culp,* 102 Fed. (2d) 352, 133 A.L.R. 1445 (certiorari denied 307 U. S. 636, 83 L. Ed. 1518, 59 S. Ct. 1032), and with the decision of the Supreme Court of the State of Colorado, in *Ginsberg vs. Bennett,* 106 Colo. 285, 104 Pac. (2d) 142.

2. Whether the decision of the United States Court of Appeals for the Tenth Circuit, on the second appeal, is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit, in the case of *Emerson vs. Little Sox Oil Company,* 3 Fed. (2d) 265, in that the

royalty interest, if any, now awarded the petitioners in this case is a fluctuating, uncertain portion of the lessees' interest in the oil produced with none of the elements of certainty necessary to constitute an interest in real estate; whereas, the United States Court of Appeals for the Fifth Circuit holds that an overriding royalty is an interest in land and is a part of the land. If part of the land, necessarily such interest is fixed and certain.

3. Whether the United States Court of Appeals for the Tenth Circuit so far departed from the accepted and usual course of judicial procedure as to call for the exercise of the power of supervision of this Court, and in particular:

(a) Did said Court follow and apply the law of the case as established in its first decision?

(b) Did said Court disregard the provisions of the assignment which was the basis of the trust relationship found to exist, and, by an unjustifiable extension of equitable discretion, allow the original trustee's assignee, with notice, to benefit by a breach of contract and a violation of duty contrary to decisions of this Court and of the Supreme Court of the State of Colorado?

4. Whether said Court decided an important question of local law; namely, the nature of overriding royalty and the manner of computing the same, in a way contrary to the weight of authority, and probably in conflict with decisions of the Supreme Court of the State of Colorado.

5. Did the United States District Court for the District of Colorado acquire jurisdiction by reason of the removal of this case from the State Court? The subsidiary question is whether there was a separable controversy with the requisite diversity of citizenship.

IV.

STATUTE INVOLVED

The pertinent statutory provision bearing on the jurisdictional question discussed under Reasons for Granting Writ of Certiorari is 28 U. S. C., Section 71, which was in force at the time of the removal of the case commenced by petitioners from the State Court to the Federal Court.

V.

STATEMENT

A petition for writ of certiorari to review the first decision of the United States Court of Appeals for the Tenth Circuit, reported as *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408, was filed by the respondents herein and others. Certiorari was denied May 1st, 1950. See *Gray et al. vs. Oldland et al.,* 339 U. S. 948, 70 S. Ct. 803.

To understand the questions now presented, it is necesarry to refer to the record on the first appeal, which record will be referred to as "Orig. R.," as well as to the record on the second appeal to the United States Court of Appeals for the Tenth Circuit, which record will be referred to as "R." followed by the appropriate page number.

Both records have been certified, as provided by Rule 38(7) of this court. Both proceedings, insofar as material to a consideration of the questions now presented, are properly before this court. See *Panama R. Company vs. Napier Shipping Company,* 166 U. S. 280, 17 S. Ct. 572; *City of Indianapolis vs. Chase National Bank of the City of New York,* 314 U. S. 63, 62 S. Ct. 15.

This case was commenced by filing a complaint in the District Court of the State of Colorado in and for the County of Rio Blanco, to impress a trust on a lease from the United States of America to Nellie Ione Gray and Evlyn Levison, which lease had been assigned to Phillips Petroleum Company by the lessees, with the reservation of a royalty interest by Levison and Gray (Orig. R. 3-16).

The case was removed from said State Court on the ground of diversity of citizenship (Orig. R. 20-22 and 27). Motion to remand was made in the United States Federal District Court (Orig. R. 27-30). The motion was denied (Orig. R. 30). The proceedings on first appeal reported in *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408, followed.

After denial of the petition for writ of certiorari, the case was remanded to the District Court of the United States for the District of Colorado (Orig. R. 622). The judgment of the United States Court of Appeals, following the first appeal, provided, "that this cause be and the same is hereby remanded to said District Court for further proceedings in conformity to the opinion expressed in the opinion of the Court" (Orig. R. 622). The District Court entered judgment (R. 16-20) for four per cent (4%) of the oil and seven and one-half per cent (7½%) of the *gas from gross production under the lease.* The second appeal by respondents followed. The opinion on this appeal reversed the judgment of the District Court (R. 33-39).

The court, in its judgment, directed, "that this cause be and the same is hereby remanded to the said District Court with directions to award the appellees four per cent of the oil and seven and one-half per cent of the gas produced and sold from the leasehold estate, *after the deduction of the statutory government royalty*" (R. 40-41). (Italics are ours.)

VI.

REASONS FOR GRANTING THE WRIT

1. The decision on the first appeal reported as *Gray et al. vs. Oldland et al.,* 179 Fed. (2d) 408 (Orig. R. 611-622), ~~under~~ the language printed as Appendix B, *infra,* Page 14, which we deem material in the determination of the question here presented.

When effect is given to all parts of the opinion on the first appeal, it will appear that the court awarded the petitioners a royalty of four per cent (4%) of the oil and seven and one-half per cent (7½%) of the gas produced,

based on gross production under the lease assigned to and held by respondent. This conclusion is fortified, if not made conclusive, by the interpretation placed on said opinion in the petition for rehearing filed by respondent, and others. A part of paragraph 11 of said petition (Orig. R. 630), on which the above statement is based, is printed as Appendix C, *infra,* Page 15.

In the opinion on the second appeal, the Court said:

> "In retrospect, however, we perceive how the learned trial court was led to construe our phraseology as it did, indeed, how all of the parties were at one time so misled. The use of the words 'in addition to the royalty due the government' in the original assignment to McLaughlin undoubtedly obligated him to pay the Oldlands the stipulated percentage of the value of all the oil produced and saved from the permit area. And, we have said that the rights of the parties under this agreement were 'preserved in all their vitality in the leases on which oil was ultimately obtained by Phillips'." (R. 34-35)

The decision had become the law of the case and was binding on the court, which rendered it on subsequent appeals under the doctrine announced in *Chicago, St. Paul, M. & O. R. Company vs. Culp,* 102 Fed. (2d) 352, 133 A.L.R. 1445. (Certiorari denied 307 U. S. 636, 59 S. Ct. 1032, 83 L. Ed. 1518.) In that case the court said:

> "While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases."

The decision we are seeking to have reviewed, and the decision just cited, are in conflict on a principle material to a proper decision of this case.

2. In the assignment dated March 15th, 1926, (Orig. R. 13-16), the basis of the rights claimed by petitioners herein, a copy of which is printed as Appendix A, *infra,* Pages 11-14, the terms "overriding royalty," "working

interest," and "leasehold estate" were not used. Because said terms were used in the first opinion, 179 Fed. (2d) 408, the United States Court of Appeals, concludes, in its second opinion, that petitioners were only entitled to four per cent (4%) of that part of the oil which remains after deduction of the percentage of oil payable to the United States as royalty. But the assignment contemplated a fixed percentage on total production. The right awarded petitioners as limited by the court in its opinion on the second appeal fluctuates and varies from day to day, month to month, and year to year. This fluctuation is not due to an increase or decrease in total production but to a variation in the rate of the United States' royalty, depending, according to the terms of the lease (Orig. R. 461 and 485), upon how much oil is produced under the management of lessees from each well. Because of the uncertain and variable elements mentioned above, petitioners' right, as fixed by the second decision, to a share in the production has none of the certain features of an interest in real proprety. However, in the case of *Emerson vs. Little Sox Oil Company,* 3 Fed. (2d) 265 (certiorari denied, 268 U. S. 700, 45 S. Ct. 636), the Fifth Circuit Court of Appeals held that overriding royalty is an interest in real estate. In principle, the two decisions are in conflict because a right to participate in the profits of a working interest is not real estate. *Mills-Willingham Law of Oil and Gas,* Page 185, Section 128; *Consolidated Arizona Smelter vs. Hinchman,* 212 Fed. 813.

The Emerson case is supported by the great weight of authority. Unless the instrument of conveyance otherwise provides, royalty and overriding royalty are universally based upon gross production. *Homestake Exploration Company vs. Schoregge,* 81 Mont. 604, 264 Pac. 388; *Mills-Willingham Law of Oil and Gas,* Section 128, Page 185; *2 Thornton on Oil and Gas* (5th Ed.), Section 363, Page 645; *3 Summers on Oil and Gas,* Section 554, Pages 317-319.

3. The decision on the second appeal in the United States Circuit Court of Appeals is unusual. It departs

from the accepted and usual course of judicial procedure in the following respects:

(a) For the reasons mentioned above, the decision departs from the established principle referred to as the law of the case.

(b) It invokes, in order to explain inconsistencies between the language used in the first opinion and the conclusion reached in the second opinion, an application of the principle of equitable discretion. Equitable discretion is closely related to and limited by judicial power.

In *Osborn et al. vs. The Bank of the United States,* 9 Wheaton 740 at 866, 22 L. Ed. 204 at 234, the Court said:

> "Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in the course prescribed by law; and when that is discerned it is the duty of the court to follow it."

It is submitted that two observations are important in this connection. Certainly equitable discretion is not ordinarily appropriate to excuse a trustee from compliance with his trust obligation, *(United States vs. Dunn,* 268 U. S. 121 at 132, 45 S. Ct. 451; *Bowes vs. Cannon,* 50 Colo. 262, 116 Pac. 330) nor is the equitable power properly invoked to excuse breach of contract generally. *(Rogers vs. Bruce,* 69 Colo. 298 at 300, 193 Pac. 1076; *Toll vs. McKenzie,* 88 Colo. 582 at 589; 299 Pac. 14.)

4. There is another consideration that impels the petitioners to ask for a review of the last decision of the United States Court of Appeals; namely, the importance to the oil industry of an authoritative decision as to the manner of computing overriding royalty. We urge that the meaning adopted in the opinion sought to be reviewed is contrary to the views of the text writers, and the decisions wherein that question has been considered in connec-

tion with instruments which grant overriding royalty expressed in percentage terms. In practically all of the decisions and by the text writers cited above, it is said that overriding royalty is calculated on gross production. The difference in dollars and cents in the two methods of computation amounted to Thirty-nine Thousand Two Hundred Dollars ($39,200.00) at the time judgment was entered on June 23rd, 1950 (R. 16-22). It is a safe assumption that the ultimate amount involved will be at least five (5) times that much.

5. The unexpected construction given by the United States Court of Appeals on the second appeal to the opinion and mandate rendered on the first appeal by which the nature and the monetary value of the petitioners' rights were radically altered to petitioners' great detriment lead us to reopen the question of jurisdiction, although we did not seek review of this question in this Court following the first decision.

In the *City of Indianapolis vs. Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15 (See also 314 U. S. 714 and 62 S. Ct. 355) this Court held that the denial of a writ of certiorari, when a case was before the Court the first time, did not confer jurisdiction on the Federal District Court where there was not the requisite diversity of citizenship, and granted a writ of certiorari on the second petition and held that jurisdiction did not exist.

Nellie Ione Gray, Evlyn Levison, A. C. McLaughlin and nineteen (19) of the plaintiffs were all residents of the State of California. The complaint sought to impress a trust against the interest of oil and gas production reserved by Levison and Gray, and also against the interest of Phillips Petroleum Company, to the extent necessary to make up any difference in the amount of royalty to which plaintiffs below, petitioners herein, were entitled (Orig.-R. 4-16). The complaint, as drafted, presented no separable controversy. The rule announced in *Alabama Great Southern Railroad Company vs. Thompson,* 200 U.

S. 206, 26 S. Ct. 161, 50 L. Ed. 441, is applicable and controlling here. The Court said:

> "But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal *(Wilson v. Oswego Twp.,* 151 U. S. 56, 66, 38 L. Ed. 70, 75, 14 Sup. Ct. Rep. 259), and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bills, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal."

To the same effect is *Wecker vs. The National Enameling & Stamping Company,* 204 U. S. 176, 27 S. Ct. 184.

Many of the United States Supreme Court cases are reviewed in *Regis vs. United States Drug Company,* 180 Fed. 201, by Judge Lowell. We believe the cases demonstrate that there is no separable controversy involved, and, hence, no jurisdiction in the Federal Courts, under 28 U. S. C. 71, which was in effect when this case was removed to the District Court of the United States. The propriety of certiorari as a method of protecting Federal jurisdiction from unauthorized calls upon it is not controlled by the probable usefulness of the decision as a precedent and consequently the recent change in the removal statute is not important here.

V.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRANK DELANEY,
L. H. LARWILL,

Counsel for Petitioners.

APPENDIX A

ASSIGNMENT FROM OLDLAND GROUP TO A. C. McLAUGHLIN, DATED MARCH 15TH, 1926 (ORIG. R. 13-16) SIGNATURES AND ACKNOWLEDGMENT ARE OMITTED.

"This agreement, made and entered into this 15th day of March, 1926, by and between R. Oldland, Maggie Moog, Thomas W. Leonard, J. W. Rector, C. T. Carney, Ambrose Oldland, W. C. Montgomery, M. K. Parsons, O. J. Shideler, J. J. Banta, J. M. Neal and Heirs of J. J. Shideler, Deceased, parties of the First part, hereinafter designated 'Oldland Group', and A. C. McLaughlin, party of the second part, hereinafter designated 'Assignee',

"Witnesseth:

"That the said Oldland Group in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations to them in hand paid, receipt whereof is hereby acknowledged, and in further consideration of the royalties hereinafter set forth to be paid by the Assignee, and of the covenants and agreements hereinafter contained, subject to the approval of the Secretary of the Interior, does assign, transfer, convey and set over unto the said Assignee, his heirs, administrators, executors and assigns, that certain Oil and Gas Prospecting Permit issued by the United States of America under date of February 5th, 1924, designated 'Glenwood Springs, Colorado, 023128, embracing land situate in the County of Rio Blanco, State of Colorado, more particularly described as follows, to-wit: W½ SW¼ Sec. 14; W½ NE¼, NW¼, E½ SE¼ Sec. 15; E½ NE¼ Sec. 16; E½ E½ Sec. 22; W½ W½ E½ Sec. 23; W½, W½ E½ Sec. 26; E½ E½ Sec. 27, T. 2 N., R. 102 W., 6th P. M., Colorado; containing 1760 acres.

"The said Oldland Group covenants and agrees that full compliance has been made with the provisions of Paragraph Two of said Permit, in that prior to June 30th, 1925, a substantial and adequate drilling outfit was installed on said permit area and actual drilling operations were commenced, and that at the date hereof said permit is a valid and subsisting permit on the records of the General

Land Office and that there are no liens or encumbrances of any kind or nature of record or otherwise against said permit or the lands embraced therein.

"The said Assignee covenants and agrees to carry on such drilling and operations on said permit area as to fulfill the terms and conditions of said permit within the period therein prescribed or any extensions thereof. Assignee, for the purpose of carrying on such drilling operations is hereby granted the right to use the Star Drilling Machine, Boiler and Tools of said Oldland Group, without cost or expense therefor to said Assignee.

"It is understood and agreed by the parties hereto that notwithstanding anything in this agreement to the contrary, Assignee shall have the right at any time to terminate this agreement and to discontinue all operations upon said property and to abandon such property and to deliver same back to the Oldland Group; provided that upon abandonment, Assignee shall quitclaim and re-assign to said Oldland Group all right, title and interest as acquired hereunder in and to said permit and shall pay said Oldland Group the sum of two Thousand Dollars ($2,000.00), if at the date of said re-assignment Assignee shall not have complied with the drilling requirements of said permit, and receipt of such sum of $2,000.00 by said Oldland Group shall be construed as full release of Assignee from any and all obligations hereunder.

"In event of discovery being made upon said permit area of oil and/or gas in quantities deemed by Assignee to be sufficient to pay to pump or to otherwise secure and save the same, then Assignee shall apply for leases embracing said permit area and Assignee shall have the right to designate the one-quarter of the permit area to be embraced in lease prescribing a flat Government royalty of 5%.

"That in event of leases being issued to Assignee embracing one-quarter and three-quarters of said permit area, Assignee shall pay out of production secured thereon royalties due the Government as in said leases prescribed and

shall pay to said Oldland Group a royalty of 7½% of the market value at the time produced of oil produced and served on said lease embracing one-quarter of the permit area in which a Government royalty of 5% is prescribed and shall pay to said Oldland Group a royalty of 4% of the market value of the oil produced and saved on said lease embracing three-quarters of the permit area in which a graduated Government royalty is prescribed. For all gas produced and saved and sold off the premises by Assignee, Assignee shall pay said Oldland Group 7½% of all moneys received from the sale of such gas.

"If casinghead gasoline is manufactured on the demised premises, or elsewhere by Assignee from gas produced from said demised premises, then Assignee shall pay to said Oldland Group 7½% of the proceeds from the sale of said gasoline, less the entire cost of gathering, manufacturing, handling and selling the same. It is agreed between the parties hereto that 70% of the gasoline extracted from the gas produced on the demised premises shall be considered as covering the entire cost of gathering, manufacturing, handling and selling said gasoline, and the remaining 30% shall be divided between the parties hereto, on the basis of 7½% to the said Oldland Group, and 92¼% to Assignee. Assignee shall have the right to contract for the manufacture of casinghead gasoline from gas produced on the said premises on the same basis hereinabove mentioned—that is, 70% to the party manufacturing said gasoline, and 30% to be divided between the parties hereto, on the basis of 7½% to Oldland Group and 92½% to Assignee.

"Payment hereunder by Assignee to said Oldland Group shall be made on the 20th day of each calendar month for all royalty substances produced and sold by Assignee during the next preceding calendar month. Payment by Assignee to said Oldland Group is to be made hereunder to First National Bank of Meeker, Colorado, for account of said Oldland Group, and payment to said Bank is to be full release therefor to Assignee, and Assignee shall

in no manner be responsible for the disbursement of said payment.

"This agreement shall inure to the benefit of and be binding upon the heirs, representatives, executors, administrators and assigns of the parties hereto.

"In Witness Whereof, the parties hereto have caused this agreement to be executed the day and year first hereinabove written."

APPENDIX B

EXCERPTS FROM OPINION, GRAY ET AL. VS. OLDLAND ET AL., 179 FED. (2D) 408.

"Federal law did not create this asserted cause of action, nor it is an essential element thereof in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties arise out of a private contract, and they must stand or fall upon its construction or effect. * * * * * (Page 412)

* * * * "In the event the leases were issued to the assignee as provided by the permit and underlying legislation, McLaughlin agreed, in addition to the royalty due the Government, to pay to appellants 'a royalty of 7½ per cent of the market value at the time produced, of oil produced and saved on the said lease embracing one-fourth of the permit area in which a Government royalty of 5 per cent is prescribed, and shall pay to the Oldland Group a royalty of 4 per cent of the market value of the oil produced and saved on the said lease embracing three-fourths of the permit area in which a graduated Government royalty is prescribed.'

"Although he did not drill the wells contemplated, McLaughlin did keep the permits alive, always in the name of his assignors. When in 1938 he applied for an exchange lease under the 1935 Amendment, he acknowledged by affidavit the interest of the assignors in the permit and that such rights would be transferred to any lease granted. * * * (Page 413)

* * * * * * *

"But even though the subsequent legislation operated to entinguish the rights of the appellants as between them and the Government, it did not affect the rights of the parties under the private contract. As we have said, the rights of the parties here do not arise out of the federal act. They have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law. • • • •

• • • • • •

"When McLaughlin applied for his exchange lease under the 1935 Amendment, *he acknowledged his obligation to pay the original permittee 4 per cent on all oil produced under the lease.*" (Italics are our own) (Page 415)

APPENDIX C

EXCERPTS FROM PETITION FOR REHEARING FILED BY RESPONDENT, AND OTHERS, ON THE FIRST APPEAL (ORIG. R. 630-631)

• • • "We may validly assume that, as to the lease on ¾ of the acreage, where the government royalty would have been 12½% and more (on a graduated scale upward), the resultant total royalties to the government and the Oldland Group would have been substantially the same, or exactly the same, as under the present lease. But that is not so as to the remaining one-quarter of the acreage where the royalty to the government would have been a flat 5%. As to that one-quarter of the acreage, the total royalty to the government and the Oldland Group would have been a flat 12½%. Under the present lease, and the decision rendered by this Court, that combined royalty is 21%, which total is made up of 4% payable to the Oldland Group and 17% payable to the government (as appears at pages 461, 485, of the record, 17% is the government rate where production varies from 90 to 110 barrels per day, as was the case here at the time of trial; see record, page 306). This means that, as to this one-quarter of the acreage,